Supreme Court, U.S.
FILED
NOV 2 1984
ALEXANDER L. STEVAS
CLERK

No. 84-433

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

TOWN OF BURLINGTON, et al.,
Petitioners,

v.

DEPARTMENT OF EDUCATION FOR THE
COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari to review hypothetical legal questions and discretionary, fact-specific remedial orders and evidentiary rulings of the lower courts?

2. May the District Court, under the Education of the Handicapped Act, require a local education agency to reimburse parents for private school tuition and related expenses under the circumstances hypothesized by the Court of Appeals?

3. May a state education agency properly consider the local education agency's violations of procedural and substantive educational requirements as bearing on its ability to implement a proposed educational plan?

4. In an action under 20 U.S.C. § 1415(e)(2), may the trial court limit the evidence presented to that which is not repetitive of the evidence presented at the administrative hearing?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

STATEMENT OF THE CASE

Prior Proceedings

The respondents adopt the statement of prior proceedings contained in the decision of the Court of Appeals. Petition for Certiorari (hereinafter, "P.") at 89a-90a.

On May 29, 1984, the Court of Appeals issued its decision, affirming in part and reversing in part the decision of the District Court and remanding the case to the District Court for further proceedings. P. 87a-140a. After articulating the appropriate standards of judicial review and discussing the criteria to be considered by the District Court in determining whether to award retroactive tuition reimbursement to the parents or the Town, the Court of Appeals directed the District Court to review the state

administrative proceedings in accordance with the standards set forth in its opinion and held that, "[o]nce the district court reaches its decision, it may order reimbursement in accordance with the principles discussed [by the Court of Appeals]." P. 139a. Thereafter, the Town of Burlington ("the Town") petitioned the Court of Appeals for rehearing and rehearing en banc. That petition was denied on June 29, 1984. P. 146a.

Statement of Facts

There is no dispute that the child who has been the subject of these judicial proceedings for the past five years has severe learning disabilities and therefore is considered handicapped within the meaning of the Education of the

Handicapped Act (EHA).[1] Instead, the factual dispute in the courts below centers around the precise nature of the child's learning disabilities and the appropriate educational placement to meet his needs. Even with respect to this narrowly stated controversy, however, the petitioners' factual statement to this Court, which is not supported by any appendix or record citations, does not present a fair summary of the facts found by the District Court. Indeed, as will be discussed below, the District Court has yet to make findings on many essential and disputed matters which the petitioners nevertheless state as established facts.[2] Therefore, the respon-

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1/ See 20 U.S.C. § 1401(1).

2/ For example, the District Court specifically directed the parties not to

(footnote continued)

dents cannot adopt the statement of facts contained in the petition, but, rather, refer the Court to the statements of facts contained in the three District Court opinions. P. 30a-33a, 58a-61a, 71a-72a.

REASONS FOR DENYING THE WRIT

As provided in Rule 17 of the Rules

(footnote continued)
present evidence on and, in fact, heard no evidence on the parties' conduct with respect to subsequent evaluations of the child. P. 55a-56a. Nevertheless, petitioners recite as facts the actions of the parties in that regard. P. 6. Petitioners also state that the parents enrolled the child in private school "without seeking or obtaining permission from local or state educational authorities." P. 5. However, pursuant to the Court of Appeals' decision, the District Court has yet to determine whether the parents attempted in good faith to obtain an agreement with the school system before moving the child. P. 133a. Finally, petitioners flatly state that the child suffered a severe illness in 1977 and exhibited symptoms of serious emotional disturbance at home in 1979, P. 4, although no such findings were made by the District Court.

of this Court, "review on a writ of certiorari is not a matter of right but judicial discretion, and will be granted only when there are special and important reasons therefor." See also Ross v. Moffitt, 417 U.S. 600, 617 (1974); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Wade v. Mayo, 334 U.S. 672, 680 (1948). No such "special and important reasons" warrant the granting that extraordinary writ. Furthermore, there are several reasons why granting the writ in this case would be particularly inappropriate.

I. THE QUESTIONS PRESENTED ARE NOT RIPE FOR CONSIDERATION BY THIS COURT.

The present posture of this case, in which critical factual findings and evidentiary rulings are yet to be made by the District Court, renders the legal questions presented entirely hypothet-

ical.[3/]

In discussing the right to reimbursement, the central issue presented by

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3/ Pursuant to the decision of the Court of Appeals, the District Court has yet to determine whether the Town committed procedural violations in developing an Individual Education Plan (IEP) for the child, P. 108a; whether the IEP proposed by the Town met the state's substantive standards, P. 112a; whether witnesses who testified at the administrative hearing should be permitted to testify again in court, P. 115a, 139a; whether the findings of the state hearing officer regarding procedural and substantive violations of state law should be accepted or rejected in part or in whole, P. 117a, 139a; whether the Town's 1979-80 IEP was improper, P. 124a; whether the Carroll School was then the correct placement, P. 124a; whether other factual circumstances, "not now apparent," warrant denial of reimbursement to the parents, P. 124a; whether placement at the Carroll School was appropriate for years subsequent to 1979-80, P. 124a; whether the parents' placement of the child in private school was "truly unilateral," P. 131a-133a; and whether the Town committed serious procedural errors, warranting denial of reimbursement to the Town. P. 138a. Indeed, even the nature of the child's learning disabilities is yet to be determined by the District Court. P. 120a, 139a.

this petition, the Court of Appeals identified as a critical factor "the yet-to-come final decision in the case." P. 126a. Only "if [the parents] are held to have acted appropriately" in placing the child in private school, P. 129a, will the District Court need to consider the parents' claim for reimbursement. Moreover, even if the parents prevail on remand, their right to reimbursement is not established by the decision of the Court of Appeals. Rather, the Court of Appeals simply discussed the factors to be considered by the District Court if and when the parents are found to have acted appropriately. The determination of whether to award such reimbursement remains within "the sound discretion of the district court." P. 137a. Until that discretion has actually been

exercised either to award or deny reimbursement, there is nothing for this Court to review.

The question of whether the trial court, in an action under 20 U.S.C. § 1415(e)(2), may limit the evidence presented in court to that which is "additional" to the evidence presented at the administrative level is similarly unripe for consideration by this Court in this case. Under the Court of Appeals' decision, the District Court, on remand, remains free to exercise its discretion either to receive or to exclude the evidence offered by the Town. P. 115a, 139a. Unless and until the District Court refuses to hear witnesses who testified or could have testified at the state administrative hearing, the issue of whether or not the trial court has the authority to limit the introduc-

tion of evidence in this way is not squarely presented. At trial, the District Court did not so limit the evidence, but rather permitted witnesses who had testified at the administrative level to testify again in court, and the Court of Appeals refused to rule that such a limitation is required. P. 114a. Moreover, even if such a limitation would be erroneous, any such error would be harmless to the Town if the District Court nevertheless rules in the Town's favor on the merits. It would therefore be premature and perhaps unnecessary for this Court to grant certiorari on this issue.

Since the legal questions presented by the petition may never actually arise in this case, allowance of a writ of certiorari on those questions at this stage of the proceedings would be unnecessary.

As stated by Justice Frankfurter, respecting the denial of a petition for certiorari in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950):

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

This petition presents a perfect illustration of Justice Frankfurter's point. For this reason, if no other, the writ should not issue. This petition, however, also must fail because it runs a foul of other sound, self-imposed limits on this Court's certiorari jurisdiction.

II. CERTIORARI IS NOT WARRANTED TO REVIEW THE LOWER COURTS' DISCRETIONARY AND FACT-SPECIFIC EVIDENTIARY RULINGS AND REMEDIAL ORDERS.

As noted in Appalachian Power Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16 (1959), certiorari is not ordinarily granted where "the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." Since each of the questions presented by the present petition involves the exercise of discretionary judgments by the lower courts, certiorari should be denied in this case.

The principal questions presented by this petition involve the remedy of reimbursement, which the Court of Appeals held might be available to the party that ultimately prevails in the District

Court. As recognized by the Court of Appeals, the appropriateness of such relief "is a question determined by balancing the equities," P. 137a, and the determination of whether to award reimbursement to the prevailing party is "committed to the sound discretion of the district court." P. 137a. This Court should resist the petitioners' invitation to exercise that judgment itself.

The District Court similarly has broad discretion in any case to exclude relevant evidence on the grounds that "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403; see also Hamling v. United States, 418 U.S. 87, 127 (1974) ("District Court retains considerable

latitude even with admittedly relevant evidence in rejecting that which is cumulative"). Indeed, Rule 611(a) of the Federal Rules of Evidence explicity vests control over the mode of presenting evidence in the trial court so as to "avoid needless consumption of time." See also Geders v. United States, 425 U.S. 80, 87 (1976).

In actions brought under the EHA, the trial court's discretion to exclude cumulative evidence is, if anything, even broader than is generally the case because of the deference owed by the court to the administrative proceedings. Board of Education v. Rowley, 458 U.S. 176, 206 (1982). Thus, as recognized by the Court of Appeals, the determination of what evidence may be admitted "must be left to the discretion of the trial court." P. 114a, 115a. In order to

avoid unduly limiting that discretion, the Court of Appeals declined to adopt any rigid rules as to which witnesses may be allowed to testify. P. 114a. Because of the discretionary nature of such an evidentiary determination, review by this Court is unwarranted.

A final discretionary action that the petitioners ask this Court to review is the Court of Appeals' departure from what petitioners characterize as the "law of the case" with respect to the their right to be reimbursed by the parents for amounts expended on the child's tuition and related expenses. P. 21. Certiorari should be denied on that issue for several reasons.

First of all, what the petitioners characterize as the "law of the case" is, in fact, only dictum. At an earlier

stage of this case, in affirming the District Court's denial of a preliminary injunction, the Court of Appeals rejected the Town's contention that if it were required to pay the child's tuition pendente lite, it would be unable, as a practical matter, to recover that money if the Town prevailed on the merits of the case. P. 44a-45a. Without addressing the question of the Town's legal right to reimbursement, the Court of Appeals simply found that the Town had not made a sufficient showing of irreparable injury to warrant the issuance of a preliminary injunction in its favor. P. 45a, 46a-47a. Contrary to petitioners' contention, such a ruling cannot correctly be characterized as a holding that if the Town were to prevail on the merits it would be legally entitled to recover the tuition paid in the interim. Thus,

the law of the case doctrine is inapplicable here both because the Court of Appeals' previous statement on the issue of reimbursement was not "law" but dictum, Barney v. Winona & St. Peter Railroad Co. 117 U.S. 228, 231 (1886) (law of the case doctrine "does not apply to expressions of opinion on matters the disposition of which was not required for the decision"), and because that statement was made in the context of an interlocutory appeal, not a decision on the merits. See United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198-99 (1950) (interlocutory order does not constitute law of the case).

Furthermore, as discussed in the preceding section, the Court of Appeals in its most recent decision did not hold

that the Town would be precluded from obtaining at least partial reimbursement if it ultimately prevails in the District Court, but rather left the question of reimbursement for the District Court to resolve. P. 137a. Thus, even if the Court of Appeals' previous suggestion that such reimbursement might be available could be viewed as the law of the case, that "law" was not violated by its more recent discussion of the issue.

In any event, even if it accurately could be said that the Court of Appeals departed from the law of the case, it was entirely within its discretion to do so. United States v. United States Smelting Refining & Mining Co., supra at 199 ("'law of the case' is only a discretionary rule of practice"); Messenger v. Anderson, 225 U.S. 436, 444 (1912)

("law of the case . . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); Arizona v. California, 460 U.S. 605, 618 (1983) (same). Therefore, insofar as such a departure occurred here, granting of the petition for a writ of certiorari to review that discretionary action is not warranted.

III. THE COURT OF APPEALS' HOLDING THAT REIMBURSEMENT MAY BE AVAILABLE TO THE PREVAILING PARTY UNDER THE EDUCATION OF THE HANDICAPPED ACT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The Court of Appeals held that, under § 1415(e)(2) of the EHA, which allows "such relief as the district court determines is appropriate," retroactive reimbursement may be awarded to the prevail-

ing party.[4] The Court of Appeals' opinion also sets forth circumstances under which it would not be appropriate to award retroactive reimbursement to either the Town or the parents as the prevailing party on remand. P. 126a-138a.[5] For example, if the District Court finds that the Town acted in bad

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4/ The court's opinion is limited to the availability of retroactive reimbursement for tuition and related expenses. The petitioner erroneously equates retroactive reimbursement with damages, generally. P. 24. The term damages is much broader than retroactive reimbursement and encompasses such other relief as compensatory and punitive damages, which are not at issue here. See, e.g., Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356 (5th Cir. 1983); see generally Hyatt, Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies, 29 U.C.L.A. L. Rev. 1, 42-51 (1981).

5/ Up until the time of trial, the parents had paid for one year of the child's private school placement, and the Town had paid for most of the two subsequent years. Both the parents and the Town seek retroactive reimbursement for the monies paid.

faith by committing serious procedural violations, the Town may not be able to recover retroactive reimbursement even though the District Court may find that the educational plan it proposed was appropriate. P. 138a. Similiarly, if the parents are found to have acted inappropriately in placing their child in a private school during the pendencey of the administrative proceedings, reimbursement may not be available to them. P. 126a-133a. Within the guidelines set forth by the Court of Appeals, whether to allow retroactive reimbursement is "a matter of equitable relief, committed to the sound discretion of the district court." P. 137a.[6/]

6/ The petitioners apparently misperceive the Court of Appeals' holding, since they request that "[t]he First Circuit's award of damages in this case" be

(footnote continued)

The Court of Appeals' holding that an award of retroactive reimbursement requires a balancing of the equities is consistent with the language of § 1415(e)(2), which authorizes the District Court to grant "appropriate" relief. The balanced approach to reimbursement under the EHA taken by the Court of Appeals is correct and should be permitted to stand, subject, of course, to appellate review of any alleged abuses in the actual application of that approach by the trial courts.

Contrary to petitoners' assertions, the Court of Appeals' equitable approach

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(footnote continued)
reversed. P. 28. There has been, of course, no award of damages to any party; the case has been remanded for a new trial. The court stated, "[o]nce the district court reaches its decision, it may order reimbursement in accordance with the principles discussed in section IV, supra" (emphasis added). P. 139a.

to the availability of reimbursement is consistent with decisions of other circuits. See Supreme Court Rule 17.1(a). Any distinctions between the Court of Appeals' decision and those of other circuits certainly do not present the type of conflict among the circuits which warrants the granting of certiorari. Cf. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955)(quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)) (certiorari is appropriate "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.")

Few circuits have addressed the issue of retroactive reimbursement in as comprehensive a manner as the First Circuit. The issue ordinarily has arisen in a piecemeal fashion, and the courts accord-

ingly have limited their rulings on reimbursement to particular factual settings.

Those circuits that have considered the issue of retroactive tuition reimbursement to the prevailing party are in general agreement that under some circumstances reimbursement may be awarded. E.g., Anderson v. Thompson, 658 F.2d 1205, 1213 (7th Cir. 1981); Department of Education v. Katherine D., 727 F.2d 809, 817 (9th Cir. 1983).7/

The cases upon which petitioners rely to show a conflict among the circuits have not considered the availability of retroactive reimbursement to the prevail-

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7/ In fact, the Court of Appeals follows the rule first established in Anderson that where a town fails to comply with the EHA's procedural requirements it may not be able to recover retroactive reimbursement. Anderson, 658 F.2d at 1214. P. 138a.

ing party at the conclusion of the judicial proceedings. The Courts of Appeals for the Second and Third Circuits, for example, have addressed the issue of interim funding during the pendency of the appeal. E.g., Vander Malle v. Ambach, 673 F.2d 49, 52 (2nd Cir. 1982); Grymes v. Madden, 672 F.2d 321, 323 (3rd Cir. 1982).

The Courts of Appeals for the Fourth and Fifth Circuits have addressed the narrow issue of the availability of reimbursement to parents who have transferred their child to a private school during the pendency of the administrative and judicial proceedings without the agreement of state or local authorities. E.g., Stemple v. Board of Education, 623 F.2d 893, 898 (4th Cir. 1980), cert. denied, 450 U.S. 911 (1981); Stacey G. v.

Pasadena Independent School District, 695 F.2d 949, 953-54 (5th Cir. 1983).[8/]

The Eighth and Eleventh Circuit cases upon which petitioners also rely, concern the availability of compensatory and punitive damages where a child has remained in an inappropriate placement; they do not address the availability of retroactive tuition reimbursement to the prevailing party, the remedy at issue here. E.g., Miener v. Missouri, 673 F.2d 969, 979 (8th Cir.), cert. denied, 459 U.S. 909 (1982); Powell v. Defore, 699 F.2d 1078, 1081 (11th Cir. 1983).

8/ Although the Fourth Circuit has not yet permitted reimbursement to parents who have placed their child in a private school pending the administrative and judicial proceedings, e.g., Rowe v. Henry County School Bd., 718 F.2d 115, 119 (4th Cir. 1983), it has declined to hold that reimbursement would never be appropriate under any circumstances. Hessler v. State Board of Education, 700 F.2d 134, 139 (4th Cir. 1983).

Thus, a review of the cases reveals that petitioners are simply wrong in claiming that the First Circuit departs from virtually every other circuit to have considered the issue of reimbursement. P. 23. The distinctions which appear in the cases are attributable to the intensely fact-specific nature of these cases as well as the varying procedural contexts in which these cases arise. The law on reimbursement is still evolving in most of the circuits. Until a clear split among the circuits has crystalized, certiorari should be eschewed in favor of "[a] series of decisions by the courts of appeals [which] may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court." Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 945 (1978) (Stevens, J.,

respecting denial of petition for writ of certiorari).

IV. THE COURT OF APPEALS' DECISION AS TO THE SCOPE OF THE DISTRICT COURT'S REVIEW IS CONSISTENT WITH DECISIONS OF THIS COURT.

A. The Court Of Appeals' Remand To The District Court To Consider The Town's Procedural Violations Was Compelled By Rowley.

The state hearing officer found that the Town failed to comply with numerous procedural requirements in the development of the IEP at issue as well as previous IEPs prepared by the Town. P. 13a, 17a-20a. The District Court considered such violations to be irrelevant to the appropriateness of an educational plan. P. 60a. However, on the basis of this Court's decision in Board of Education v. Rowley, 458 U.S. 176 (1982), the Court of Appeals remanded the case to the Dis-

trict Court for consideration of the Town's procedural violations. P. 107a-108a.[9/] As this Court recognized in Rowley, the EHA contemplates a comprehensive regulatory scheme in which the federal government provides financial support to those states that offer free educational services for handicapped children. Instead of attempting to provide detailed substantive standards for the kind of education that should be provided to

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9/ Insofar as some of the procedural violations found by the hearing officer involve state law, we interpret the Court of Appeals' decision as requiring the District Court to consider and give due weight to the procedural violations found by the state hearing officer. The District Court itself is precluded from determining whether there were violations of state law and awarding relief on that basis. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 917 (1984); see Smith v. Robinson, 104 S. Ct. 3457, 3464 n. 6 (1984).

handicapped children with the funds provided under the EHA, Congress has established a series of procedural requirements designed to insure that the specific educational needs of the handicapped student in question will be met. In Rowley, this Court emphasized the importance of the EHA's procedural safeguards:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation in every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205-06.

Thus, Rowley provides that procedural violations should be of central concern to a district court exercising its judicial review function under 20 U.S.C. § 1415(e)(2):

> . . . [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07.

Thus, since the procedural requirments of the EHA are as central to the child's rights as is the specific classroom instruction offered, the Court of Appeals properly remanded the case to the District Court for consideration of the hearing officer's finding of "continuing procedural irregularity." P. 13a.

B. The Guidelines Established By The Court Of Appeals For The Admission Of "Additional Evidence" Are Consistent With The Rowley Requirement That The Administrative Proceedings Be Accorded Due Weight.

The judicial review provision of the EHA provides that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The Court of Appeals held that the word "additional" should be construed in its ordinary sense to mean supplemental. While the court left to the discretion of the trial judge what additional evidence should be admitted, it cautioned:

> Thus construed, this clause does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding as Rowley requires.

P. 113a-114a.

The Court of Appeals properly considered the Rowley requirement that the administrative proceedings be given due weight in setting guidelines for the District Court on the issue of "additional evidence." Without the limits suggested by the District Court, the judicial review process would become the trial de novo proscribed by Rowley. Allowing the parties to introduce any evidence they wish, including repetitive and refined testimony from the same witness who testified at the administrative hearing,

merely trivializes, rather than gives "due weight," to the exhaustive administrative process set out by Congress. Cf. Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), cert. denied, 104 S.Ct. 196 (1983)(reviewing town's educational placement under an abuse of discretion standard "renders the administrative hearings provided for by the Act virtually meaningless").

Since the guidelines set forth by the Court of Appeals are thus consistent with the plain meaning of the term "additional," other provisions of the EHA that set forth a comprehensive administrative scheme, and the Rowley "due weight" requirement, those guidelines need not be reviewed by this Court.

CONCLUSION

For the reasons stated above, the respondents request that the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

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